

City of Detroit


CITY COUNCIL

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TO: The Honorable Detroit City Council

FROM: David Whitaker 

DATE: October 14, 2009

RE: **ATTORNEY GENERAL'S OPINION AS TO QUORUM
REQUIREMENTS OF THE OPEN MEETINGS ACT**

The Michigan Attorney General (AG) issued the attached opinion number 7235, dated October 9, 2009, in response to a question posed by State Senator Hansen Clarke at the request of the Research and Analysis Division (RAD). (See attached.) RAD sought clarification of quorum requirements pursuant to the Open Meetings Act (OMA) for City Council discussions where the meeting has been properly noticed but lacks a quorum at the time the session is convened.

The AG's opinion notes that the OMA "does not specifically address what a public body may do absent a quorum"; rather, the Act requires that the body's decisions be made at a meeting open to the public and that deliberations of the body, where a quorum is present, shall be at a meeting open to the public. (See, *OAG Opinion No. 7235*, page 4.) Significantly, the opinion notes: "[a] public body does not engage in the act of deliberating or deciding public business merely by listening to testimony from the public." Thus, the opinion concludes:

It is my opinion, therefore, in answer to your first question, that a city council "committee of the whole" may listen to testimony from the public and city administrative staff when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq.*, but lacks a quorum when it actually convenes.¹ (*OAG Opinion No. 7235*, page 5.)

¹ RAD notes that the Attorney General's opinion fully supports the position espoused by Council Member Collins. The opinion, however, also acknowledges that the OMA "does not specifically address what a public body may lawfully do absent a quorum (emphasis added)." RAD's contrary position was a conservative interpretation recognizing the potential legal consequences of violation of the OMA.

Finally, the opinion concludes:

It is my opinion, therefore, in answer to your final question, that a city council "committee of the whole" may ask questions or make comments when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq.*, but lacks a quorum when it actually convenes. The city council's committee of the whole may not, however, render any decisions in the absence of a quorum. (*OAG Opinion No. 7235*, page 6.)

Consistent with the holding of OAG Opinion No. 7235, RAD advises that the City Council may take testimony, ask questions, and make comments during Council sessions, absent a quorum. Although not specifically addressed by the opinion, this advice is applicable to standing committees and closed sessions as well.

Should you have further questions, please advise.

Attachments

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

OPEN MEETINGS ACT:

Permissible activity under the Open Meetings Act where a city council's

QUORUM:

committee of the whole meets to hear testimony

A city council "committee of the whole" may listen to testimony from the public and city administrative staff when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq*, but lacks a quorum when it actually convenes.

A city council "committee of the whole" may ask questions or make comments when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq*, but lacks a quorum when it actually convenes. The city council's committee of the whole may not, however, render any decision in the absence of a quorum.

Opinion No. 7235

October 9, 2009

Honorable Hansen Clarke
State Senator
The Capitol
Lansing, Michigan

You have asked three related questions, which collectively inquire whether, under the Michigan Open Meetings Act (OMA or Act), MCL 15.261 *et seq*, a city council "committee of the whole" may listen to testimony from the public and city administrative staff if it properly notices a meeting but lacks a quorum when it actually convenes.

The OMA was enacted to promote governmental accountability and to foster openness in government as a means of enhancing responsible decision making. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 222-223; 507 NW2d 422 (1993). Its primary purpose is to ensure that public bodies conduct all their decision-

making activities in open meetings "and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors." *Schmiedicke v Clare School Bd*, 228 Mich App 259, 264; 577 NW2d 706 (1998). To that end, unless an exception applies, the OMA requires public body meetings to be open to the public, and to be preceded by public notice of the time and place of the meeting.

"Public body" is defined in section 2(a) of the OMA, MCL 15.262(a), as "any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered . . . to exercise governmental or proprietary authority or perform a governmental or proprietary function." As a public body, a city council may create various committees to assist the council in the performance of its duties. You indicated that city council members in this particular instance met as a "committee of the whole" to listen to testimony from the public and city administrative staff. The information you provided, however, does not indicate the committee's scope of authority nor the nature of the testimony to be heard. A "committee of the whole" generally refers to a committee composed of all of the members of the public body, rather than a committee composed of some lesser number. See *American Heritage College Dictionary*, 3rd Edition (1997) and *Arnold Transit Co v City of Mackinac Island*, 99 Mich App 266, 274; 297 NW2d 904 (1980).

"Meeting" is defined in section (2)(b) of the OMA, MCL 15.262(b), as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy." A "meeting" of a public body, as

contemplated by the OMA, consists of three elements: (1) a quorum, (2) deliberation or rendering of a decision¹, (3) on a matter of public policy. *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000) (citing OAG, 1979-1980, No 5437, p 36 (February 2, 1979)).

The term "quorum" is not defined in the OMA. In the absence of a statutory definition, it is appropriate to consult a dictionary for the ordinary meaning of a statutory term. *Peters v Gunnell, Inc*, 253 Mich App 211, 220; 655 NW2d 582 (2002). The *American Heritage College Dictionary*, defines a quorum as the minimal number of officers and members of a committee or organization who must be present for the valid transaction of business. Similarly, *Black's Law Dictionary* (8th ed) p 1284, defines a quorum as the minimum number of members (usually a majority of all the members) who must be present for a deliberative assembly to legally transact business. Based on the information you provided, a quorum for the nine-member city council is five members.

By definition, a gathering of less than a quorum of a public body generally does not constitute a "meeting" within the meaning of the OMA and need not comply with the requirements set forth in the OMA. Likewise, the Act does not apply to committees and subcommittees composed of less than a quorum of the full public body if they "are merely advisory or only capable of making 'recommendations concerning the exercise of governmental authority.'" OAG, 1977-1978, No 5183, p 21, 40 (March 8, 1977). See

¹ The term "decision" is defined in section 2(d) of the OMA, MCL 15.262(d), as "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy."

also OAG, 2001-2002, No 7087, p 45 (August 21, 2001); OAG, 1997-1998, No 6935, p 18 (April 2, 1997); and OAG, 1993-1994, No 6799, p 147 (May 18, 1994).

Where a committee or subcommittee is empowered to act on matters in such a fashion as to deprive the full body of the opportunity to vote on the matter, the committee's decision "is an exercise of governmental authority which effectuates public policy" and the committee proceedings are subject to the OMA. OAG, 1977-1978, No 5222, p 216 (September 1, 1977). The Attorney General opined in OAG, 1997-1998, No 7000, p 197 (December 1, 1998), that a meeting of a standing committee of a county board of commissioners, composed of less than a quorum of the full board, is subject to the OMA when the committee is effectively authorized to determine what items of county business are referred for action by the full board. In a similar vein, where a city council "effectively authorized" a committee to perform a governmental function and the committee held public meetings to solicit public input, the committee was subject to the OMA despite the fact that the committee was not capable of rendering a final decision. *Morrison v East Lansing*, 255 Mich App 505, 517-520; 660 NW2d 395 (2003).

Returning to your question, the OMA does not specifically address what a public body may lawfully do absent a quorum, but section 3(2) and (3) of the OMA, MCL 15.263(2) and (3), does state that "[a]ll decisions of a public body shall be made at a meeting open to the public" and "[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public."

A public body does not engage in the act of deliberating or deciding public business merely by listening to testimony from the public. Where less than a quorum is present and there are citizens and administrative staff who wish to address the public body, it is permissible for the members who are present to listen to their comments.² In OAG, 1977-1978, No 5364, p 606, 607 (September 7, 1978), where a quorum was present, it was noted:

[T]he members may listen to presentations by their constituents or observe demonstrations at the gathering without the need to comply with the [A]ct.

It is my opinion, therefore, in answer to your first question, that a city council "committee of the whole" may listen to testimony from the public and city administrative staff when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq*, but lacks a quorum when it actually convenes.

The answer to your first question means that no answer is required for your second question.

Your final question asks whether a properly noticed meeting of the city council "committee of the whole" violates the Open Meetings Act, MCL 15.261 *et seq*, if members ask questions or make comments when the meeting lacks a quorum.

² Even if a quorum is not present when a meeting is scheduled to begin, it may be prudent to keep a record of the meeting. The record would be useful to document that the meeting was called to order at the time and place specified in the notice. The names of those in attendance could be noted, along with what topics, if any, were discussed and any actions that were taken to obtain a quorum. The record could also include the time of adjournment, to document that those in attendance attempted to meet as scheduled and waited a reasonable time for absentees to arrive.

To repeat, under circumstances where a quorum is present, OAG No 5364 concluded that a public body does not violate the public notice provisions of OMA when its members meet for the sole purpose of listening to testimony from the public. OAG No 5364 cautioned, however, that, "if a gathering designed to provide information develops into deliberations on matters of public policy or leads to decisions on matters within the jurisdiction of the council, the members will have crossed the boundary of the exemption in section 3(10) of the Open Meetings Act" from providing public notice of the meeting. OAG No 5364 at p 607.

That, however, is not an issue in the situation outlined in your request. The meeting was properly noticed and, thus, the public would have "the opportunity to be present so that they *can observe the manner in which public bodies transact public business*. *Haven v City of Troy*, 39 Mich App 219; 197 NW2d 496 (1972)." OAG, 1977-1978, No 5183, p 21, 32 (March 8, 1977) (emphasis in original).

It is my opinion, therefore, in answer to your final question, that a city council "committee of the whole" may ask questions or make comments when it properly notices a meeting under the Open Meetings Act, MCL 15.261 *et seq*, but lacks a quorum when it actually convenes. The city council's committee of the whole may not, however, render any decision in the absence of a quorum.

MIKE COX
Attorney General

From: David Whitaker
To: senatorhansenclarke@senate.michigan.gov
Date: 5/1/2009 9:37 AM
Subject: Questions to be put to the A.G.

CC: Baitinger, Kerry; Powers, Analine; Robinson, Peggy

Senator Clarke: I hope and trust that all is well with you, sir. There are a number of issues that have arisen under Michigan's Open Meetings Act relative to Detroit City Council's operations that need clarification from the State's Attorney General's Office they are as follows: Whether a city council meeting, *properly noticed* as a committee of the whole (presently consisting of 8 seated members), must have a quorum present (5) if the intent of council is *only* to take testimony from members of the public or a representative from an administrative department? Would such a gathering (less than 5) constitute a *meeting* of the body within the meaning of the OMA, or would this amount to an informal gathering of those members present? Would it matter if the council members present asked questions or offered comment during the meeting, and if they were to participate in the discourse, would such violate the OMA?

Given that an opinion must be sought from a member of the legislature, I am request your assistance in this regard. It is of some import that the response comes quickly, please do what you can to facilitate this request.

Thank you in advance for your kind attention to this important matter. David

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